regardful of the interests of the general public.[24] To allow labor disputes to settle themselves by protracted struggles of might smacks of the primitive administration of justice by self-help.

EQUITABLE RELIEF FOR UNILATERAL MISTAKE OF FACT. — It is a fundamental principle that a party may not escape an obligation imposed by a formal contract, into which he voluntarily entered, merely because he has made a "hard bargain." [1] Where the negotiations of the parties are expressed in writing, their intention to contract is, of necessity, judged objectively.[2] But as mistakes are more or less common in everyday affairs, it is expedient that relief from such an ironclad rule be granted in certain cases. This is a true function of equity, and affirmative relief is obtainable through the remedies of reformation and cancellation.

A mistake of fact may be bilateral, common to both parties, or unilateral, a mistake of one party only. Where the parties have executed an instrument under a mutual erroneous belief in the existence of the subject matter, it would obviously be inequitable to allow either to demand performance.[3] Again, if the terms of a contract are ambiguous and each reasonably takes a different view as to the identity of the subject matter, there is no real meeting of the minds and neither should be allowed to force his interpretation upon the other.[4]

Where the parties have made a real agreement, but there has been a mutual mistake in reducing it to writing, neither should be allowed to profit thereby. Such a mistake does not invalidate the agreement, as equity will reform the instrument so as to express the true intent of the parties.[5] Such reformation may be made by a court of equity even where the Statute of Frauds requires such contracts to be in writing.[6] Likewise, where one party knew of the mistake in the instrument at the time of execution, he cannot be heard to say that the mistake was not mutual; equity will reform the instrument so as to conform to the agreement actually made or determined upon to be the real purpose and intention of the parties.[7]

A more difficult question arises where the mistake in the original agreement [8] is that of one party only. It is clear that there can be no

[24] See Henry B. Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13.

[1] But equity may refuse to enforce the specific performance of a contract, the result of which would be to impose great hardship on either party. Falcke *v.* Gray, 4 Drewry 651, 660. See FRY, SPECIFIC PERFORMANCE, part 3, c. 6.

[2] "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." Holmes, J., in O'Donnell *v.* Clinton, 145 Mass. 461, 463. See Stoddard *v.* Ham, 129 Mass. 383.

[3] Hitchcock *v.* Giddings, 4 Price 135; Fritzler *v.* Robinson, 70 Ia. 500, 31 N. W. 61.

[4] Raffles *v.* Wickelhaus, 2 H. & C. 906; Kyle *v.* Kavanagh, 103 Mass. 356.

[5] Fowler *v.* Fowler, 4 De G. & J. 250. Thus, where the parties made an erroneous mathematical calculation, the instrument was reformed. Dunn *v.* O'Mara, 70 Ill. App. 609.

[6] For a full discussion of this question, see 2 POMEROY, EQ. JURIS., §§ 864–867.

[7] Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293; Welles *v.* Yates, 44 N. Y. 525.

[8] There is always a preliminary question of fact whether the parties intended to be

reformation to accord with the view of the party in error, for this would be forcing upon the other a contract which he never agreed to make.[9] Where the mistake of the one is induced by the fraud or misrepresentation of the other, it seems clear that the latter should not be allowed to take advantage of the formal contract. Hence not only will the party deceived have a valid defense to any action on the contract,[10] but a cancellation of the instrument may be decreed in equity.[11] In such a case the subject of the mistake must be material,[12] and the party's conduct must be determined by it; yet it may relate either to the motive, or to the object of the agreement itself.[13] Further it is not a conclusive bar to relief that the agreement has been partially executed, unless such performance was made with knowledge of the mistake.[14]

If the mistake was unilateral, and of such a nature that the other party knew or should have known of it, he should not be permitted to take advantage of it, even though he was in no way responsible for the error; it is inequitable for one to treat as an agreement that to which he knew or should have known the other never intended to agree.[15] But, in such a case, the mistake must have been as to the essence of the agreement, the very object, as distinguished from a motive or inducement of its execution.[16] It is submitted that the same principles should apply where, as in a recent Minnesota case,[17] the unilateral mistake in an offer was unknown to the offeree at the time of acceptance. It is true that the latter was not guilty of any inequitable conduct during the inception of the contract. Accordingly, if he has changed his position, so that he could not be put *in statu quo*, the court should afford rescission "only when the clearest and strongest equity imperatively demands it," [18] for he should not be affirmatively prejudiced by the mistake, however honest, of the offeror.[19] But if he has not changed his position, he will be prejudiced only to the extent that he loses the benefit of the apparent contract. It would be unjust for him to take that which he now knows the other never intended

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bound by their agreement before it is put into a formal writing. See Edge Moore Bridge Works *v.* Bristol County, 170 Mass. 528, 49 N. E. 918.

[9] Diman *v.* Providence, W. & B. R. Co., 5 R. I. 130.

[10] Roebuck *v.* Wick, 98 Minn. 130, 107 N. W. 1054. See Vail *v.* Reynolds, 118 N. Y. 297, 23 N. E. 301.

[11] Adam *v.* Newbigging, 13 App. Cas. 308; Brewer *v.* Brown, 28 Ch. Div. 309.

[12] Smith *v.* Kay, 7 H. L. C. 750, 775; Flight *v.* Booth, 1 Bing. N. C. 370, 377.

[13] Brown *v.* Search, 131 Wis. 109, 111 N. W. 210; Pratt *v.* Darling, 125 Wis. 93, 103 N. W. 229; Wagner *v.* Nat'l Ins. Co., 90 Fed. 395.

[14] Butler *v.* Prentiss, 158 N. Y. 49, 64, 52 N. E. 652; Mason *v.* Bovet, 1 Denio (N. Y.) 69. But if a party, after discovering the misrepresentation, performs his part, he may be precluded thereby from rescission, though not from the legal remedy of damages. Whitney *v.* Allaire, 4 Denio (N. Y.) 554, aff'd 1 N. Y. 305.

[15] Webster *v.* Cecil, 30 Beav. 62. See Neill *v.* Midland R. Co., 20 L. T. (N. S.) 864.

[16] Mistake as to a collateral matter or mistake in a party's motive for entering the contract, or in his expectation respecting it, is not sufficient. Fehlberg *v.* Cosine, 16 R. I. 162, 13 Atl. 110. See Chanteur *v.* Hopkins, 4 M. & W. 399.

[17] St. Nicholas Church *v.* Kropp, 160 N. W. 500. For a full statement of the facts see *infra*, p. 649.

[18] Grymes *v.* Sanders, 93 U. S. 62.

[19] Young *v.* Springer, 113 Minn. 382, 129 N. W. 773; Tatum *v.* Lumber Co., 16 Idaho 471, 101 Pac. 957. *Cf.* Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, where depreciation in the value of the property was held not to be a "change of position," and Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813, where rescission was allowed for a unilateral mistake in respect to the purchase price, though the contract had been executed.

to give. Rescission or cancellation in such a case does not, as has been contended,[20] impair the stability of contractual transactions. Equity will not cancel the contract unless it appears affirmatively that there was a genuine mistake which went to the essence of the contract, and not merely to the motive.[21] The evidence to sustain the claim of mistake must be clear and convincing, and not merely a preponderance.[22] Under such requirements, there is little danger that any real agreements will be fraudulently invalidated; and the alternative to such relief is an unjust enforcement of apparent contracts in many cases where there has been no real agreement.

The language in many cases suggests that "negligence" is a bar to equitable redress in these cases.[23] But unless the other party has been led thereby to change his position, negligence is immaterial,[24] except in so far as it may tend to show that there was no honest mistake. Almost every mistake involves lack of proper diligence; hence such a rule would bar equitable relief in most cases of mistake. In the analogous legal action of quasi-contract for money paid under mistake, it is well settled that negligence is not of itself a bar to recovery; [25] surely equity should not be less slow to apply its own principles. The other party's stand is just as inequitable whether the mistake was made through negligence or through inadvertence.[26] In either case, it would be unjust for him to enrich himself at the other's expense by taking advantage of his formal rights. He cannot complain of the other's carelessness if he has not been prejudiced by it. Equity merely requires that neither party shall be prejudiced where there has not been in fact a meeting of the minds upon the essence of the contract. Accordingly, it would seem that the principal case is consonant with sound equitable principles in looking beyond the formal appearance to the true intent of the parties, where the underlying reasons for the observance of the formalities will not be prejudiced.[27]

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[20] Brown *v.* Levy, 29 Tex. Civ. App. 389, 69 S. W. 255; Moffett, etc. Co. *v.* Rochester, 91 Fed. 28 (reversed in 178 U. S. 373); Steinmeyer *v.* Schroeppell, 226 Ill. 9, 80 N. E. 564.

[21] See note 16, *supra*.

[22] Crilly *v.* Board of Education, 54 Ill. App. 371; Nevius *v.* Dunlap, 33 N. Y. 676.

[23] See Grant Marble Co. *v.* Abbott, 142 Wis. 279, 124 N. W. 264; Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833; Steinmeyer *v.* Schroeppell, *supra*. But an examination of these and similar cases discloses that negligence was but one ground upon which relief was denied; either it was considered that there was not an honest material mistake, or else there had been such performance that the parties could not be placed *in statu quo*.

[24] Snyder *v.* Ives, 42 Ia. 157, 162; Harris *v.* Pepperell, L. R. 5 Eq. 1.

[25] Kelly *v.* Solari, 9 M. & W. 54. See KEENER, QUASI-CONTRACTS, 70–72.

[26] "The ground on which the rule rests is, that money paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties. The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made." Bigelow, J., in Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518, 522.

[27] See Board *v.* Bender, 36 Ind. App. 164, 72 N. E. 154; Harper *v.* Newburgh, 159 App. Div. 695, 145 N. Y. Supp. 59; Moffett, etc. Co. *v.* Rochester, 178 U. S. 373; Scott *v.* Hall, 58 N. J. Eq. 42, 43 Atl. 50; Werner *v.* Rawson, *supra*, accord. *Cf.* Steinmeyer *v.* Schroeppell, *supra;* Brown *v.* Levy, *supra*.